



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 15, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-3140

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120597.

The Texas Department of Health (the "department") received a request for information relating to complaint numbers 96-10067, 96-10077, 96-10043, 97-10275, 96-10026, 95-10086, 94-10163 and 97-10342, filed against Quest Hospital of Amarillo, Texas. You contend that some of the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with various statutes and by rights of privacy. You have submitted the responsive documents, marked to indicate the information you seek to withhold and the respective exceptions. We have considered the exceptions you claim and have reviewed the information at issue.

As you note, the department failed to timely request an open records decision from this office as required under Government Code section 552.301. Failure to timely request a decision results in the legal presumption that the requested information is open to the public; only the demonstration of a compelling interest can overcome this presumption. *See Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). A demonstration that the requested information is deemed confidential by law is an example of a compelling interest sufficient to negate this presumption. *See Open Records Decision No. 150 (1977).*

Section 552.101 of the Government Code excepts from disclosure information made confidential by statute. You relate that portions of the responsive documents are medical records (including patient identification numbers) made confidential by section 5.08 of article 4495b of Vernon's Texas Civil Statutes (the "MPA"). The MPA applies to

“[c]ommunications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient” and “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” As you relate, some of the information at issue appears to have been obtained from records and communications protected by the MPA. This information is confidential and may be disclosed only in accordance with the MPA. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991).

You also relate that portions of the responsive documents are mental health records made confidential under Health and Safety Code section 611.002. This statute makes confidential, *inter alia*, records of the identity, diagnosis, evaluation or treatment of a patient that are created or maintained by mental health professionals, with exceptions not applicable here. Such records must therefore be withheld.

You also relate that a portion of the responsive information consists of records of proceedings of a medical committee in a licensed health care facility, and are thereby made confidential by Health and Safety Code section 161.032(a). This statute makes confidential the records and proceedings of “medical committees” other than those records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center or extended care facility. “Medical committee,” as defined by Health and Safety Code section 161.031, includes any committee of, among other entities, a hospital, or an extended care facility. You argue that section 161.032(a) applies to a document that appears to be the record of a review made by the medical records committee of Quest Hospital. We agree that this document is subject to section 161.032 of the Health and Safety Code and therefore must not be released.

You further relate that a portion of the responsive information consists of a report made confidential by section 48.101 of the Human Resources Code. This statute pertains to reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities, and reads in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under . . . chapter [48 of the Human Resources Code];
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department rule and applicable federal law.

This information is confidential pursuant to section 48.101(a) of the Human Resources Code. *See* Hum. Res. Code § 48.082(a); *see also id.* § 48.002 (definitions). Consequently, it must not be disclosed except for purposes consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See id.* § 48.101(b); *but see id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances). We further agree that none of the provisions permitting release are applicable to the subject information.

You relate that some of the requested information is made confidential by section 261.201(a) of the Family Code. This statute pertains to reports of abuse or neglect of a child. In pertinent part it reads as follows:

(a) The following information is confidential and not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect, made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

You have submitted records that apparently consist of "files, reports, records, communications, and working papers used or developed in an investigation" of child abuse or neglect under chapter 261 of the Family Code and are thus confidential. *See* Open Records Decision No. 440 at 2 (1986) (applying predecessor statute, holding such items excepted "by its very terms"). The department must withhold these documents from disclosure under section 552.101 of the Government Code.

Finally, you argue that portions of the responsive information are excepted from disclosure by rights of privacy. Section 552.101 of the Government Code excepts from required public disclosure information that is made confidential on constitutional grounds or by judicial decision, including information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). As common-law privacy rights are broader than, and subsume constitutional privacy rights, we look to the common-law test as articulated by the Texas Supreme Court in the context of requests for disclosure of public information.

Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Id.* In this case, the requested complaint file contains several such facts which must be withheld.

We have applied the above rationale to the submitted documents and marked the information to be withheld accordingly.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Michael J. Burns", with a stylized flourish at the end.

Michael J. Burns
Assistant Attorney General
Open Records Division

MJB/rho

Ref: ID# 120597

Enclosures: Marked documents

cc: Mr. William E. Kelly, III
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(w/o enclosures)